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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

DISTRICT OF COLUMBIA, PETITIONER,

v.

THE WASHINGTON POST COMPANY AND WASHINGTON TIMES-HERALD, INC., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,
GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C.,
HENRY E. WIXON,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

PRINTING DIVISION—D. C. GOVERNMENT

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DISTRICT OF COLUMBIA, PETITIONER,

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THE WASHINGTON POST COMPANY AND WASHINGTON TIMES-HERALD, INC., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The District of Columbia, a municipal corporation, through its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered June 14, 1956, affirming decisions of the District of Columbia Tax Court which cancelled District of Columbia use taxes assessed against respondents.

OPINIONS BELOW

The official opinion of the United States Court of Appeals for the District of Columbia Circuit has not been reported as yet in either the official reports of that

court or in the Federal Reporter. The opinion is included herein on page 1a, *infra*, of Appendix A to this petition.

The opinion of the District of Columbia Tax Court is not reported. The opinion of the District of Columbia Tax Court, and its decisions, from which appeals were taken to the United States Court of Appeals for the District of Columbia Circuit, are included in the joint appendix, printed in accordance with the rules of the United States Court of Appeals for the District of Columbia Circuit, and filed with this petition.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals for the District of Columbia Circuit was dated and entered June 14, 1956, and is included herein on page 4a, *infra*, of Appendix A to this petition.

It is believed that this Court is vested with jurisdiction to review the judgment of the United States Court of Appeals for the District of Columbia Circuit by Writ of Certiorari under the provisions of Title 28, Part IV, Section 1254(1), United States Code, and Section 4, Title IX, District of Columbia Revenue Act of 1937, 50 Stat. 673, ch. 690, as added by Section 8 of the Act of May 16, 1938, 52 Stat. 356, ch. 223 (Section 47-2404, D. C. Code, 1951).

QUESTIONS PRESENTED

1. Where the applicable statute confers upon a litigant before the District of Columbia Tax Court a right of review of the Tax Court's decision by the United States Court of Appeals for the District of Columbia Circuit, and where Section 46, Title 28, United States Code, requires each United States Circuit Court of Appeals to hear

and determine cases and controversies brought before it, was the petitioner, the District of Columbia, deprived of due process of law in violation of the Fifth Amendment of the Constitution of the United States of America when the United States Court of Appeals for the District of Columbia Circuit denied a motion of the District of Columbia for a hearing by the court en banc and, sitting as a court division of three circuit judges, refused to hear or determine the principal question raised by the District of Columbia on its appeals to that court from decisions of the District of Columbia Tax Court on the sole ground that a division of the United States Court of Appeals for the District of Columbia Circuit cannot overrule a prior decision of that court rendered en banc?

2. Where the statute creating the District of Columbia Tax Court requires that court to hear and determine all questions arising on an appeal to it, and to make separate finding of facts and conclusions of law, and to render decisions on such questions in writing, and makes no provision for consideration by the court of evidence in the form of depositions taken outside the District of Columbia, may that court authorize the taking of such depositions, accept such depositions in evidence, and base its decisions in part upon such depositions?

3. Where there is presented for determination the question whether contracts between respondents and syndicates were contracts for the furnishing of personal services or contracts for the sale of tangible personal property upon which would depend the liability of respondents for District of Columbia use taxes, is the District of Columbia Tax Court justified in cancelling assessments of District of Columbia use taxes against respondents, and is the United States Court of Appeals for the District of Columbia Circuit justified in affirming such cancellations, where the District of Columbia Tax Court failed to make either a finding of fact as to whether

such contracts were contracts for personal services, or for the sale of tangible personal property, or to reach a conclusion of law on that matter?

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED.

Constitutional Provisions:

The Fifth Amendment of the Constitution of the United States of America, Volume 1, U. S. Code, p. XLIV.

Statutes Involved:

Secs. 116. (a), 119, 141. (a), District of Columbia Sales Tax Act, 63 Stat. 112, ch. 146, (Secs. 47-2601-16. (a); 47-2601-19; 47-2618. (a), D. C. Code, 1951); Sections 201. (a), 201. (b) (3), 202, 203, 206 and 212, District of Columbia Use Tax Act, 63 Stat. 124, ch. 146, (Secs. 47-2701. (a) and (b) (3), 47-2701-2, 47-2701-3, 47-2701-6, 47-2702, D. C. Code, 1951).

Sections 1, 3, 4. (a), (c), (d), (e), (f), and (g), Title IX, District of Columbia Revenue Act of 1937, 50 Stat. 673, ch. 690, as added by Section 8 of the Act of May 16, 1938, 52 Stat. 356, ch. 223, and as amended by Section 3. (b) and Section 5 of the Act of July 10, 1952, 66 Stat. 543, ch. 649 (Secs. 47-2401, 47-2403, 47-2404, 47-2408, 47-2409, D. C. Code, 1951, as supplemented by Supp. IV).

Title 28, Section 48, U. S. Code.

Rules of Court Involved:

Rule 29 of the Rules of Procedure Before the District of Columbia Tax Court.

The rules of the District of Columbia Tax Court are not contained in any official or unofficial report, but may be found in Corporation Tax Service—State and Local—District of Columbia Tax Service, published by Commerce Clearing House, paragraph 13-830.

The pertinent provisions of the Constitution of the United States of America, the Statutes, and the Rules of Procedure Before the District of Columbia Tax Court involved are printed in Appendix B, *infra*, pp. 1b-9b.

STATEMENT OF THE CASE

The District of Columbia Revenue Act of 1949 contains two titles which impose in the District of Columbia a sales tax and a compensating-use tax on sales and use of property and services. Title I of this Act is cited as the District of Columbia Sales Tax Act, and Title II of the Act is cited as the District of Columbia Use Tax Act [1]. Section 212 of the District of Columbia Use Tax Act imposes a tax at the rate of two per centum of the sales price on the use, storage, or consumption of any tangible personal property and services sold or purchased at retail sale. (App. B, p. 4b) Section 206 of the District of Columbia Use Tax Act defines the word "use" to mean the exercise by any person within the District of any right or power over tangible personal property and services sold at retail, whether purchased within or without the District by a purchaser from a vendor. (App. B, p. 4b) The word "purchaser" is defined by Section 203 of the Use Tax Act as meaning any person who shall have purchased tangible personal property or services sold at retail. (App. B, p. 4b) The words "purchase" and "purchased" are defined in Section 202 of the Act to mean and include:

> "(a) any transfer, either conditionally or absolutely, of title or possession or both of the tangible personal property sold at retail;
> "(b) any acquisition of a license or other authority to use, store, or consume, the tangible personal property sold at retail;
> "(c) any sale of services sold at retail."

[1] Act of May 27, 1949, 63 Stat. 112, ch. 146.

Section 201 of the Use Tax Act defines the words "retail sale", "sale at retail", and "sold at retail" to mean all sales in any quantity or quantities of tangible personal property, whether made within or without the District, and services, to any person for the purpose of use, storage, or consumption, within the District, taxable under the Act. These words, however, do not include, according to Section 201:

> "(3) Professional, insurance, or personal service transactions which involve sales as inconsequential elements for which no separate charges are made." (App. B, p. 3b)

The Use Tax Act provides that certain provisions of the District of Columbia Sales Tax Act shall be applicable to compensating-use taxes. The definition of "tangible personal property" in Section 119 of the Sales Tax Act, which means corporeal personal property of any nature, is among the included provisions. (App. B, p. 2b) The definition of "sales price" in Section 116 of the Sales Tax Act is also included as part of the Use Tax Act. "Sales price" is defined to mean the total amount paid by a purchaser to a vendor as consideration for a retail sale valued in money, whether paid in money or otherwise. No deduction is allowed by Section 116 from "sales price" on account of:

> "(1) The cost of the property sold.
> "(2) The cost of materials used, labor or service cost, interest charged, losses, or any other expenses." (App. B, p. 2b)

This definition of "sales price" includes any services that are a part of the sale.

These cases arose as a consequence of assessments of District of Columbia use taxes which were made against respondents on the basis of certain tangible personal property purchased by respondents for use in the District

of Columbia in the preparation of newspapers published by respondents in the District of Columbia (R. 69, 72). The tangible personal property consisted of daily comic strips furnished respondents by Syndicates, which were delivered to respondents in the form of matrices bearing impressions of the comic strips from which respondents, in turn, prepared a metal plate the size of a newspaper page which was used to print the strip in the newspaper (R. 75). The furnishing of the matrices to respondents was based upon written contracts between respondents and Syndicates. These contracts, although not uniform in language, provided generally that the Syndicate, for a specified price, daily or weekly, would furnish respondents specified features consisting of such items as the comic strips involved in these cases, as well as dinner menus, sports columns, nature stories, and other matters of interest. The features were to be supplied in proof or matrix form. The majority of the contracts between the Syndicates and respondents contained provisions, in varying forms, relieving the Syndicates from any liability to respondents in the event any author or artist should fail, by reason of illness or other cause beyond the control of the Syndicate, to furnish the Syndicate with a feature which the Syndicate was required to supply in matrix form to respondents. The contracts contained provisions for assignment by respondents of the contracts to others; in some cases the contracts prohibited the sale or other disposition by respondents of features furnished to respondents without written consent of the Syndicates (R. 103, 106, 109, 111, 117, 122, 126, 130).

On appeal to the District of Columbia Tax Court from the assessments of compensating-use taxes,[2] respondents

[2] That Court had jurisdiction over the appeals of respondents from the assessments of compensating-use taxes against them pursuant to Section 141(a) of the District of Columbia Sales Tax Act, 63 Stat. 112, ch. 146, which is applicable to the District of Columbia Use Tax Act, 63 Stat. 124, ch. 146 by Section 210 of the Use Tax Act (Secs. 47-2618(a) and 47-2701-10, D. C. Code, 1951).

claimed that they were not liable for such taxes on the ground that the contracts involved were professional or personal service transactions which involved sales as an inconsequential element for which no separate charges were made and, thus, were exempt from the compensating-use tax under Section 201 of the District of Columbia Use Tax Act and, in addition, that none of the transactions involved the use or consumption of any tangible personal property or the purchase or sale of services and, consequently, the transactions were not taxable.

Prior to the hearing of these cases before the District of Columbia Tax Court, respondents filed with that court a notice that they intended to take in the city of New York, New York, depositions of certain witnesses in New York City. No statement was contained in the notice as to the purpose of the depositions or the necessity that such depositions be taken (R. 58, 60). Thereafter, the District of Columbia moved the court to vacate the notice of taking of depositions on the ground that the court lacked statutory authority to permit depositions to be taken; that the court lacked authority to reach the witnesses named in the notice by the issuance of any process; that respondents had not tendered payment or consented to pay any of the expenses which might be incurred by the District of Columbia incident to the taking of such depositions; that it did not appear that any part of the proposed depositions would be admissible under the rules of evidence of the court, or the purpose, if any, for which the depositions were to be taken and, lastly, that the rules of the District of Columbia Tax Court are not applicable to depositions which might be taken outside the District of Columbia (R. 60). The District of Columbia Tax Court denied the motion to vacate and, in a memorandum on the matter, stated that Rule 29 of the Rules of Procedure Before the District of Columbia Tax Court, relating to depositions, was applicable and was

ample authority for the taking of the depositions in question (R. 61, 65). When these cases came on for hearing before the District of Columbia Tax Court, that court, over the objection of counsel for the District of Columbia, admitted the depositions in evidence (R. 40-42, 54-55). The court also wrote a memorandum opinion on the objections of the District of Columbia to the admission of the depositions in evidence and entered a formal order accepting the depositions in evidence (R. 66-68). The depositions in major part concern the costs to Syndicates of obtaining from independent contractors the matrices which the Syndicates contracted to supply to respondents, *without reference to any costs* incurred by the Syndicates in obtaining the features in question from the artists or authors to whom reference is made in the contracts between the Syndicates and respondents (R. 133, 144). The evidence by way of depositions relating to the cost to the Syndicates of obtaining a matrice, and evidence adduced at the trial of these cases of similar nature, was used by the Tax Court to make findings of fact as to the value or sales price of the matrices furnished by the Syndicates to respondents (R. 76-78), and these findings of fact led, in turn, to a statement in the opinion of the District of Columbia Tax Court that:

> "The physical or material value of the mats or matrices furnished the petitioners by the syndicate was in no instance in excess of four per cent of the amount charged for the services rendered petitioner under the contracts between petitioners and the particular syndicate. The percentages ran from less than one to four per cent, which obtained in one instance only." (R. 79-80)

Among the findings of fact of the District of Columbia Tax Court is one relating to the arrangements between Syndicates and the artists who furnished the Syndicates

the material which the Syndicates in turn supplied by contract to respondents. The Tax Court found as a fact that it was the typical arrangement between the Syndicates and the artist for the artist to receive fifty per cent of the gross proceeds received by the Syndicate from the sale of the feature (R. 75-76).

Although the District of Columbia Tax Court cancelled the assessments of use taxes in these cases, that court *did not find* as a fact that the contracts between respondents and the Syndicates were personal service transactions involving sales as inconsequential elements for which no separate charges were made. The District of Columbia Tax Court *did not find* as a fact that in each case the sale by the syndicates of the matrix supplied to respondents was an inconsequential element of the transaction, and it *did not find*, as a fact, that the charge for the matrix was not represented by the contractual price paid for the feature represented by the matrix. The District of Columbia Tax Court, in cancelling the assessments of compensating-use taxes against respondents, made no reference in its opinion to any of the provisions of the District of Columbia Use Tax Act, *supra*, nor to Section 116 of the District of Columbia Sales Tax Act which is applicable to compensating-use taxes and which defines "sales price" to mean the total amount paid as consideration for a retail sale without any deduction on account of the cost of the property sold, or the cost of materials used, labor or service cost, interest charged, losses, or any other expenses. The District of Columbia Tax Court relied for its decision upon *Washington Times-Herald, Inc.* v. *District of Columbia*, 94 U.S. App. D.C. 154, 213 F. 2d 23, decided by the United States Court of Appeals for the District of Columbia Circuit en banc, in which that court, referring to a regulation promulgated by the Commissioners providing that: "The phrase 'sales as inconsequential elements' shall be deemed to include any

sales of tangible personal property made in connection with professional, insurance, or personal service transactions where the *sales price* of the tangible personal property is less than 10% of the amount charged for the services rendered in the transaction."[3] (Italics supplied), held that contracts between Syndicates and newspapers in that case were personal service contracts and thus non-taxable (R. 80-81). The Tax Court, however, in its opinion in these cases referred to, but refused to follow, a case decided by the Court of Appeals for the District of Columbia entitled *Meyer* v. *Washington Times Co.*, 64 App. D.C. 218, 76 F. 2d 988, cert. denied 295 U.S. 734, wherein the Court of Appeals, in a matter involving facts identical to these with the exception of the question of tax liability, held that the contract between the Washington Times Co. and the Syndicate in that case was not a contract for personal services; that the contract was one for the sale of merchandise only, and that the contract for personal services was that between the artist who conceived the comic strip and the Syndicate which purchased it and in turn sold it to the newspaper (R. 81).

Following the decisions of the District of Columbia Tax Court cancelling the assessments of compensating-use taxes against respondents, the District of Columbia appealed to the United States Court of Appeals for the District of Columbia Circuit.[4] *Washington Times-Herald, Inc.* v. *District of Columbia, supra*, contains no reference to *Meyer* v. *Washington Times Co., supra*, and is in direct conflict with *Meyer* v. *Washington Times Co., supra*. The appeal to the United States Court of Appeals for the District of Columbia Circuit in these cases was predicated upon the conflict existing in

[3] CCH—Corp. Tax Service—State & Local—D. C., ¶ 64-005.

[4] That Court had jurisdiction over the appeals from the decisions of the District of Columbia Tax Court pursuant to the provisions of Section 4, Title IX, of the Act of August 17, 1937, 50 Stat. 673, ch. 690, as added by Section 8 of the Act of May 16, 1938, 52 Stat. 371, ch. 223 (Sec. 47-2407, D. C. Code, 1951).

decisions of the Court of Appeals and upon errors claimed by the District of Columbia to have been committed by the Tax Court in disposing of these cases; namely, the unauthorized use of depositions and the failure of the Tax Court to make proper findings of facts which were essential to a conclusion by the court. In view of the apparent failure of the United States Court of Appeals for the District of Columbia Circuit to give consideration to its decision in *Meyer* v. *Washington Times Co., supra*, of which no mention is made in *Washington Times-Herald, Inc.* v. *District of Columbia, supra*, and in view of the importance of the other questions presented on appeal to the United States Court of Appeals for the District of Columbia Circuit, the District of Columbia filed in the Court of Appeals a motion for hearing en banc (R. 160). That motion was denied (R. 166), and the cases were set down for hearing before a division of the court consisting of three of the circuit judges of that court.

On May 21, 1956, the division convened for the hearing of the appeals. Prior to any argument by counsel for the District of Columbia, the division advised counsel for the District of Columbia that no argument would be permitted on the question of the liability of respondents for District of Columbia compensating-use taxes, as raised on the appeals, for the reason, as stated in the decision of the court on June 14, 1956, "that this Division of the Court could not overrule the en banc Times-Herald case and therefore would not hear argument that it should be overruled." (R. 181.) Under these circumstances, since the Court of Appeals refused to give consideration to the principal question raised on appeal by petitioner District of Columbia, the District of Columbia could do nothing else but submit these cases to the court on its brief.

Following the hearing, but prior to decision, the District of Columbia filed in the United States Court of Appeals for the District of Columbia Circuit a motion

that the court vacate its order denying the original motion of the District of Columbia for a hearing en banc and moving the court to grant such a hearing. The grounds for the motion were (1) that counsel for the District of Columbia had been denied by the division of the court hearing these cases permission to argue the question of the liability of respondents for District of Columbia compensating-use taxes under the statute which imposes such taxes for the stated reason that the division was without authority to overrule *Washington Times-Herald, Inc. v. District of Columbia, supra;* (2) that the District of Columbia had been denied the due process of law to which it is entitled under the Fifth Amendment to the Constitution of the United States; and (3) that it had been denied, as well, the statutory hearing to which it was entitled on the points raised on appeal of these cases to the Court of Appeals (R. 167). On June 8, 1956, the United States Court of Appeals for the District of Columbia Circuit denied that motion (R. 180). On June 14, 1956, the division of the court which had heard the appeals rendered its decision (R. 181). That decision affirmed the decisions of the District of Columbia Tax Court and judgments were entered accordingly (R. 185). No statement is contained in the decision of the Court of Appeals concerning any of the points raised by the District of Columbia on its appeals to that court. The question of the authority of the District of Columbia Tax Court to authorize the taking of depositions in proceedings before it, and to use those depositions in deciding matters pending before it, and the question of the sustainability of the decisions of the Tax Court, in view of its failure to make pertinent and proper findings of fact regarding the nature of the transactions between respondents and the Syndicates, were disposed of in the decision of the court by the statement:

> "We find no error affecting substantial rights." (R. 183.)

REASONS FOR GRANTING THE WRIT

This Court, in *Western Pacific R.R. Corp.* v. *Western Pacific R.R. Co.*, 345 U.S. 247, decided April 6, 1953, considered and decided a question arising under 28 U.S.C. § 46(c), relating to hearings and rehearings of cases and controversies by a Circuit Court of Appeals or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. Certiorari was granted in that case because, in the language of this Court, "* * * we deemed it important to resolve the *en banc* questions precipitated by this litigation." 345 U.S. 247, 250. This Court concluded in the *Western Pacific R.R.* case, *supra*, that, irrespective of whether a Circuit Court of Appeals grants a hearing or rehearing before the court en banc, a litigant is entitled to suggest to the court, or to the division—depending upon where power of initiation resides, as determined by the active circuit judges of the court—that a particular case is appropriate for consideration by all the judges. This Court said in its opinion:

> "A court may take steps to use the *en banc* power sparingly, but it may not take steps to curtail its use indiscriminately." 345 U.S. 247, 261.

There are presented on these petitions questions at least equal in importance to those in the *Western Pacific R.R.* case if, indeed, they are not more important, for in these cases not only did the United States Court of Appeals for the District of Columbia Circuit, on two separate occasions, deny motions of the District of Columbia for a hearing en banc but, in addition, a division of that court refused, as its opinion in these cases shows, to consider the basic question raised on appeal by petitioner on the sole ground that the division could not overrule a prior decision of the court rendered en banc.

In these cases, therefore, the District of Columbia has been denied that hearing and consideration of its appeals to which it was entitled under the Constitution and the statutes regulating appeals to the circuit courts of appeals. The importance of this matter, not only as it relates to the District of Columbia, but also as it relates to proceedings throughout the Federal judiciary, is manifest.

Additionally, there are presented to this Court questions equal in stature to those in *District of Columbia* v. *Pace*, 320 U.S. 698, decided January 10, 1944, and *District of Columbia* v. *Murphy*, 314 U.S. 441, decided December 15, 1941, both of which involved cases arising under the tax laws of the District of Columbia. These cases involve a question important in the construction and administration of the District of Columbia Sales Tax Act and the District of Columbia Use Tax Act, *supra*, as well as important questions pertaining to the procedures of the District of Columbia Tax Court.

1.

The Court's Refusal to Permit Petitioner to Argue its Appeals Denied Petitioner the Statutory Review to Which it was Entitled and Due Process of Law Under the Fifth Amendment of the Constitution of the United States.

Section 141(a), Title I of the District of Columbia Sales Tax Act, 63 Stat. 112, ch. 146, which is made applicable to compensating use taxes by Section 223, Title II of the District of Columbia Use Tax Act, 63 Stat. 124, ch. 146 (Secs. 47-2618 and 47-2713, D.C. Code, 1951) provides that any vendor or purchaser aggrieved by a final determination of tax or denial of an application for refund of any tax may, within ninety days from the date of the final determination of the tax or from the date of the denial of an application for refund, as the case may be, appeal to the Board of Tax Appeals for the District of Columbia (now known as the District of Columbia Tax Court) in

the same manner and to the same extent as set forth in Title IX of the District of Columbia Revenue Act of 1937, as amended.[5]

By definition, the word "court", as used in the Act which created the District of Columbia Tax Court, means United States Court of Appeals for the District of Columbia Circuit.[6] Section 4(a) of Title IX of the Act of August 17, 1937, as amended, *supra*, creating the District of Columbia Tax Court, specifically provides that upon review of a decision of the District of Columbia Tax Court by the United States Court of Appeals for the District of Columbia Circuit:

> "* * * the court shall have the power to affirm, modify, or reverse the decision of the Board with or without remanding the case for hearing as justice may require. The court shall have exclusive jurisdiction to review the decisions of the Board in the same manner and to the same extent as decisions of the United States District Court for the District of Columbia in civil actions tried without a jury; and the judgment of the court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari in the manner provided in title 28, U.S. Code, section 1254, as amended." (App. T. p. 5b.)

The statutory provisions governing appeals from decisions of the District of Columbia Tax Court not only contemplate, but require the United States Court of Appeals for the District of Columbia Circuit, if appeal is taken to it from a decision of the Tax Court, to review that deci-

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[5] Act of August 17, 1937, 50 Stat. 673 as added by the Act of May 16, 1938, 52 Stat. 371, ch. 223 and as amended by Section 5, Title IV of the District of Columbia Revenue Act of 1939, 53 Stat. 1085, ch. 367 and by Section 3 of the Act of July 10, 1952, 66 Stat. 543, ch. 649 (Secs. 47-2401, et seq. D. C. Code, 1951). (App. B. p. 4b.)

[6] Section 1, Title IX, District of Columbia Revenue Act of 1937, as added by Section 8 of the Act of May 16, 1938, 52 Stat. 371, ch. 223. (App. B. p. 5b.)

sion and this, in turn, contemplates a hearing of the issues raised on the appeal.

Title 28, Section 46, U.S. Code, provides, as to circuit courts of appeal, as follows:

> **"§ 46. Assignment of judges; divisions; hearings; quorum**
>
> (a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.
>
> (b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.
>
> (c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.
>
> (d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

The District of Columbia, in the cases for which review is now sought on Writ of Certiorari, included in the statement of points on review filed on appeal of those cases to the United States Court of Appeals for the District of Columbia Circuit the following point:

> "1. The District of Columbia Tax Court clearly erred in holding that the United States Court of Appeals for the District of Columbia Circuit overruled and repudiated the case of *Meyer* v. *Washington Times Company*, 64 App. D. C. 218, 76 F.

2d 988, cert. denied 295 U.S. 734 and, as a consequence, in holding that the sale of newspaper features by various syndicates to The Washington Post Company and the Washington Times-Herald, Inc. were personal service transactions within the meaning of the District of Columbia Use Tax Act." (R. 151, 154, 157.)

On April 2, 1956, the District of Columbia filed in the United States Court of Appeals for the District of Columbia Circuit a motion for a hearing *en banc*, stating as a basis for the motion that a prior decision of the court entitled *Washington Times-Herald, Inc.* v. *District of Columbia*, 94 U.S. App. D.C. 154, 213 F. 2d 23, conflicted with a decision of the same court entitled *Meyer* v. *Washington Times Company*, 64 App. D.C. 218, 76 F. 2d 988, certiorari denied 295 U.S. 734, and that these cases were, for this and other reasons set forth in the motion, of such importance as to warrant a consideration of the cases by the entire court (R. 160).

On April 19, 1956, the motion of the District of Columbia for a hearing *en banc* was denied (R. 166).

On May 21, 1956, these cases came on for hearing before the United States Court of Appeals for the District of Columbia Circuit sitting as a division of three of the judges of that court (R. 168). On May 24, 1956, three days after the hearing, the District of Columbia filed in the United States Court of Appeals for the District of Columbia Circuit a motion entitled "Motion to vacate order denying petitioner's motion for hearing en banc and for hearing en banc" (R. 167). That motion was predicated upon the refusal of the Court of Appeals, at the hearing on May 21, 1956, to permit counsel for petitioner to present to the division any argument concerning the liability of respondents for District of Columbia use taxes for the reason, as stated by the division, that the division was without authority to overrule the decision of that

court sitting *in banc* in the case of *Washington Times-Herald, Inc.*, v. *District of Columbia, supra.*

The motion to vacate the order denying petitioner's motion for hearing *in banc*, and for hearing *in banc*, was denied by the court June 8, 1956 (R. 180).

On June 14, 1956 the division of the court to which these appeals had been assigned rendered an opinion affirming the decisions of the District of Columbia Tax Court and, on the same day, entered its judgment of affirmance (R. 181, 185).

In its *per curiam* opinion the court states:

> "*Per Curiam:* Petitioner's principal though not its only contention is that *Washington Times-Herald, Inc.* v. *District of Columbia*, 94 U.S. App. D.C. 154, 213 F. 2d 23, should be overruled. That case was decided by the court *in banc*. Before the present case was set for hearing, the petitioner had moved for a hearing *in banc*, largely on the ground of an alleged conflict between the *Times-Herald* case and the earlier case of *Meyer* v. *Washington Times Co.*, 64 App. D.C. 218, 76 F. 2d 988, *cert. denied*, 295 U.S. 734. That motion had been denied. When this case was called for hearing, we informed counsel that this division of the court could not overrule the *in banc Times-Herald* case and therefore would not hear argument that it should be overruled. Counsel then elected in open court to submit the present case on the brief."

As the opinion of the United States Court of Appeals for the District of Columbia Circuit states, the division refused to hear argument on the principal contention of petitioner on its appeal to that court because the division could not overrule a prior decision of the court rendered *in banc*. It follows that the division was without authority, according to the opinion of the division, to overrule the prior decision of the court even though the

division should conclude that the prior decision was erroneous. In any event, petitioner was denied the opportunity of consideration by the court or even the suggestion that a prior decision of the court was erroneous. So far as counsel for petitioner have been able to ascertain no other Federal Circuit Court of Appeals has rendered an opinion denying the authority of a division of a circuit court to consider an appeal for the reason that the same court, in a prior case, has rendered a decision at variance with the contentions of the appellant.

Article V of the Amendments of the Constitution of the United States of America provides that no person shall be deprived of life, liberty, or property without due process of law. (App. B, p. 1b) The Fifth Amendment of the Constitution is applicable in the District of Columbia. *Public Utilities Commission* v. *Pollak*, 343 U.S. 451; *Bolling* v. *Sharpe*, 347 U.S. 497. This Court, in 1897, in *Hovey* v. *Elliott*, 167 U.S. 409, held that a defendant was denied due process of law by the then Supreme Court of the District of Columbia where that court refused to permit the defendant to try his case on the merits and struck the answer of the defendant from the files of the court because the defendant had disobeyed an order of the court that he pay into its registry the money which was the subject matter of the controversy. Although the facts in these cases differ from those in *Hovey* v. *Elliott*, *supra*, the effect of the action of the United States Court of Appeals for the District of Columbia Circuit upon the rights of the District of Columbia in these cases is analagous to the action of the Supreme Court of the District of Columbia in the *Hovey* v. *Elliott* case.

The Fourteenth Amendment of the Constitution assures in the States due process of law equivalent to that assured by the Fifth Amendment in the District of Columbia. Cf. *Bolling* v. *Sharpe*, *supra*. Although the Fourteenth Amendment does not require that a State provide for an

appellate review in criminal cases, this Court has held thereunder that where the State does provide an appeal and the prisoner has had the benefit of it, the proceeding in the appellate tribunal is to be regarded as part of the process of the law under which the prisoner is held in the custody of the State, and that proceeding is to be considered in determining any question of an alleged deprivation of the prisoner's life or liberty contrary to the Fourteenth Amendment. *Frank* v. *Mangum*, 237 U.S. 309, 327. This Court in *Cole* v. *Arkansas*, 333 U.S. 196, 201, said:

> "Furthermore, since Arkansas provides for an appeal to the State Supreme Court and on that appeal considers questions raised under the Federal Constitution, the proceedings in that Court are a part of the process of law under which the petitioner's convictions must stand or fall * * *."

The statute which created the District of Columbia Tax Court provides for an appeal from decisions of that court to the United States Court of Appeals for the District of Columbia Circuit. Necessarily, to have validity and meaning, an appellant must be accorded a full hearing by the appellate court. This Court, in *Morgan* v. *United States*, 298 U.S. 468, held that where a statute requires a hearing the failure to accord that hearing is not only a violation of the statute, but is a denial also of the constitutional requirement of due process of law. The action of the United States Court of Appeals for the District of Columbia Circuit in these cases clearly deprived the District of Columbia of its statutory right to review of decisions of the District of Columbia Tax Court and clearly deprived the District of Columbia of the due process of law guaranteed to it under the Fifth Amendment to the Constitution. An additional violation of petitioner's right to due process of law was committed by the Court of Appeals under the very statute from which that court

derives its authority to proceed in the disposition of cases appealed to it. Title 28, Section 46, United States Code, confers upon a division of a circuit court of appeals full authority to hear and determine cases and controversies. A decision of a division of the court is, by statute, a decision of the entire court unless a case is heard or reheard before the court en banc. (App. B, p. 8b) The division of the court to which these cases were assigned refused to hear and determine the principal contention of the District of Columbia, and the court itself twice refused to hear and determine these cases en banc. That court refused to act in accordance with the requirements imposed upon it by the United States Code. Of itself, the refusal of the division of the court to hear and determine petitioner's contentions on appeal, and the refusal of the court under those circumstances to hear these cases en banc, denied the District of Columbia both the statutory and constitutional due process guaranteed a litigant in the District of Columbia.

This Court, in *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, *supra*, a case dealing with the question of hearing and rehearings by United States circuit courts of appeals *en banc*, concluded that such hearings are discretionary with the courts. Nevertheless, this Court said in that case:

> "It is also essential that litigants be left free to suggest to the court, or to the division—depending upon where power of initiation resides, as determined by the active circuit judges of the court—that a particular case is appropriate for consideration by all the judges. A court may take steps to use the *en banc* power sparingly, but it may not take steps to curtail its use indiscriminately * * *". (345 U.S. 261).

And, apropos of the present matter, this Court, at page 263, of its opinion in the *Western Pacific Railroad* case, said:

"After the division which heard the appeal had announced its decision, petitioners asked for a rehearing *en banc*. A per curiam issued from the division:

> 'The petitions of the appellants and intervenors for a rehearing are denied. Insofar as the petitions seek a rehearing en banc, they are stricken as being without authority in law or in the rules or practice of the court. See Kronberg v. Hale, 9 Cir., 181 F. 2d 767.' 197 F. 2d., at 1012.

"The striking of petitioners' motion is certainly ambiguous. If we accord full legal significance to this order, we must conclude that the division ruled that counsel were not free to suggest, even to the division, that the case was appropriate for a rehearing *en banc*. Enough has already been said to show that this was error."

Finally, this Court, referring to the probable misconception of the United States Court of Appeals for the 9th Circuit that a division of the court lacked the power to consider a motion for a hearing *in banc*, concluded that the court in that regard misconstrued its power.

This Court has decided that a litigant who has lost a case before a division of a United States Circuit Court of Appeals is entitled, irrespective of result, to request the court to rehear his appeal. At the very least this contemplates that a litigant is entitled in the first instance to a hearing of the contentions which he presents on his appeal to a circuit court of appeals. In these cases the District of Columbia twice requested the United States Court of Appeals for the District of Columbia Circuit to hear these cases sitting *in banc*, and twice that request was denied. Conceding the authority of the court to deny the motions for hearing *in banc* that court had no authority to refuse to grant the District of Columbia any hearing on, or consideration of, the major point on appeal.

The importance of this matter to the administration of justice throughout the entire nation is manifest. It is Congress, and not the courts, which has the power to determine in what cases an appeal shall be allowed. *United States* v. *Clyde*, 13 Wall. 35, 20 L. Ed. 479; *Castro* v. *U.S.*, 3 Wall. 46, 18 L. Ed. 163. As this Court has said in *Ex parte State of Pennsylvania*, 109 U.S. 174, 27 L. Ed. 894, 895:

> "* * * Congress alone has the power to determine whether the judgment of a court of the United States, of competent jurisdiction, shall be reviewed or not."

See also *United States* v. *Rice*, 327 U.S. 742; *United States* v. *Curry*, 6 How. 106, 12 L. Ed. 363; *Alaska Packers* v. *Pillsbury*, 301 U.S. 174; *Chisholm* v. *Cissell*, 12 App. D.C. 180. In *Ex parte The City Bank of New Orleans*, 3 How. 292, 11 L. Ed. 603, 614, this Court stated:

> "* * * Congress possess the sole right to say what shall be the forms of proceedings, either in equity or at law, in the courts of the United States; and in what cases an appeal shall be allowed or not. It is a matter of sound discretion, and to be exercised by Congress in such a manner as shall in their judgment best promote the public convenience and the true interests of the citizens."

If, by the procedure followed by the United States Court of Appeals for the District of Columbia Circuit in these cases, courts of appeal may deprive a litigant of a consideration and hearing of that appeal, an appeal specifically authorized and provided for by Congress is no longer a matter of right but a privilege dependent upon judicial determination, and the circuit courts of appeal, rather than Congress, notwithstanding decisions of this Court to the contrary, may decide in what cases an appeal shall, in fact, be allowed.

2.

The Court Erred in Permitting Respondents to Take Depositions and in Accepting Such Depositions in Evidence.

Prior to the hearing of these cases respondents filed in the District of Columbia Tax Court a notice that they would take depositions of certain witnesses in New York, N. Y. (R. 58). Thereafter, and prior to the hearing, the District of Columbia filed in the Tax Court a motion to vacate said notice on the ground that the court lacked statutory authority to permit the taking of depositions; that Rule 29 of the Rules promulgated by the Tax Court is not applicable to the taking of depositions outside the District of Columbia; that those persons mentioned in the notice of the taking of depositions were not subject to the process of the court; that respondents had made no tender of payment, nor agreed to pay the expenses of the District of Columbia incident to the taking of such depositions; and that it did not appear that any part of the proposed depositions would be admissible under the rules of evidence of the court, nor had it been shown for what purpose such depositions were to be taken (R. 60). This motion was denied by the Tax Court, which stated in a memorandum that since Rule 29 of the Rules of the Tax Court (App. B, p. 8b) provided for the taking of depositions in accordance with the rules relating to depositions and discovery in force in the United States District Court for the District of Columbia, respondents were entitled to take depositions of persons in New York (R. 61, 65). Following the taking of depositions the Tax Court, over the objection of counsel for the District of Columbia, accepted those depositions in evidence (R. 40-42, 66, 67).

This Court has previously had occasion to consider and determine the important question of the effect in

the administration of the District's tax laws of the statute which created the Board of Tax Appeals for the District of Columbia, and to review that provision of the statute which provides for a review of decisions of the Board of Tax Appeals (now known as the District of Columbia Tax Court) by the United States Court of Appeals for the District of Columbia Circuit. *District of Columbia* v. *Pace*, 320 U. S. 698. There is presented on these petitions for certiorari an equally important question concerning the administration of the District of Columbia tax laws as it relates to the authority of the Tax Court to permit, in cases pending before it, the taking outside the District of Columbia of depositions of witnesses who are in no way subject to the jurisdiction of the court.

The District of Columbia Tax Court depends for its existence and authority upon the statute which created it. That statute[7] requires the Tax Court to "* * * hear and determine all questions arising on said appeal * * *". (App. B, p. 5b) The court is authorized to adopt and promulgate rules of procedure in matters for determination by the court under the provisions of the Act creating it. (App. B, p. 7b) In addition, the Tax Court is given authority to summon any person before it to give testimony on oath or affirmation or to produce books, records, papers, documents or other legal evidence as to matters before it. Such summons may be served by any member of the Metropolitan Police Department. In the case of refusal or neglect on the part of a person summoned to obey the summons to appear before the court, the court is authorized to report that fact to the United States District Court for the District of Columbia, or a judge of that court, and the District Court or any judge thereof is empowered to compel obedience to the summons to the same extent as witnesses may be compelled to obey a sub-

[7] District of Columbia Revenue Act of 1937, 50 Stat. 673, as added by Section 8 of the act of May 16, 1938, 52 Stat. 371, ch. 223.

poena of the United States District Court. (App. B. p. 8b) Nowhere, however, in the act creating the Tax Court is any authority conferred upon that court to authorize the taking of depositions either within or without the District of Columbia, and nowhere in the act is the court given the authority to determine cases pending before it upon the basis of depositions. Yet, in these cases, the Tax Court not only permitted depositions to be taken outside the District of Columbia over the objection of the District of Columbia, but accepted those depositions in evidence and used those depositions in reaching decisions therein.

Depositions were unknown to the common law, and litigants at law were entitled to a disposition of the subject matter of their litigation on the basis of testimony and evidence adduced at the trial of their cases. Both this Court and the United States Court of Appeals for the District of Columbia Circuit have recognized that the right to take and use depositions is entirely dependent upon statutory authority. *Hanks Dental Association* v. *International Tooth Crown Co.*, 194 U. S. 303; *Hutchins* v. *Hutchins*, 41 App. D. C. 367. The common law as it existed in the District of Columbia on March 3, 1901, is, by statute, applicable to the District except insofar as changes are made by Congressional legislation. It was so provided by Section 1, Chapter one, of the Act of March 3, 1901, 31 Stat. 1189, ch. 854. The application of the common law in the District of Columbia, as required by the Act of March 3, 1901, *supra,* would, in the absence of specific statutory authority, preclude courts of the District from permitting the taking of depositions for use in court proceedings. However, Congress in the same Act which made applicable to the District of Columbia the common law as it existed in the District on March 3, 1901, specifically provided for the taking of depositions in certain circumstances for use before Justices of the Peace, before the then Supreme Court of the District of Columbia in

law and equity cases, before the Probate Court of the District of Columbia, and in criminal cases.[8] The authority conferred upon Justices of the Peace to authorize the taking of depositions as provided in the Act of March 3, 1901, *supra*, was made applicable to the Municipal Court for the District of Columbia, the successor to Justices of the Peace, by the Act of February 17, 1909, 35 Stat. 623, ch. 134. Thus, every trial court in the District of Columbia has, at one time or another, been given specific Congressional authority for the taking of depositions in derogation of the common law. The exception, if it can be called such, is the District of Columbia Tax Court which is not a "court", but is an administrative agency of the Government of the District of Columbia designed and created for the very limited purpose of considering assessments of District of Columbia taxes. The United States Court of Appeals for the District of Columbia Circuit has so held. *Watrous* v. *District of Columbia*, 77 U. S. App. D. C. 295 ,135 F. 2d 654.

The status of the District of Columbia Tax Court was, by the Act of July 10, 1952, 66 Stat. 543, made more definite. Sec. 5. of that Act amended Sec. 2 of Title IX of the District of Columbia Revenue Act of 1937, as added by the Act of May 16, 1938, *supra*, and as amended, by adding a new paragraph to that section reading, in pertinent part, as follows:

> "The Board of Tax Appeals for the District of Columbia shall hereafter be known as the District of Columbia Tax Court and the member thereof shall be known as the judge of the District of Columbia Tax Court. The said District of Columbia Tax Court shall not be deemed or held

[8] Act of March 3, 1901, 31 Stat. 1189, ch. 854. Depositions—Justices of the Peace, Sec. 26, sub-chapter one, chapter one; Probate Court—Sec. 144, sub-chapter three, chapter one; Supreme Court of the District of Columbia; Civil Cases—Sec. 1058, chapter twenty-five; Equity Cases—Sec. 1061, chapter twenty-five; Criminal Cases, Sec. 922, chapter twenty.

> to be a constituent member of the assessing or taxing authority of the District of Columbia *but shall be deemed to be an independent agency*, separate and apart from such assessing and taxing authority. * * *" (Italics supplied).

The Congress, when it created the United States Board of Tax Appeals (now the United States Tax Court), an administrative tribunal for the review of Federal tax cases, specifically provided authority for the Board to procure testimony by deposition, and also provided in that connection for the payment of witness fees and expenses. This action, as it related to the United States Board of Tax Appeals, occurred in 1924, many years prior to the creation by the Congress of the Board of Tax Appeals for the District of Columbia (Sec. 900(i), Title IX, Revenue Act of 1924, 43 Stat. 253). The present Internal Revenue Code of 1954 again contains specific authority for the taking of depositions in matters before the United States Tax Court. Section 7456, I. R. C. (1954) provides in part:

> "Sec. 7456. (a) *In General.* —For the efficient administration of the functions vested in the Tax Court or any division thereof, * * * any judge of the Tax Court may examine witnesses and require, by subpoena ordered by the Tax Court or any division thereof and signed by the judge (or by the clerk of the Tax Court or by any other employee of the Tax Court when acting as deputy clerk)—
>
> "(1) the attendance and testimony of witnesses, * * * from any place in the United States at any designated place of hearing, or
>
> "(2) the taking of a deposition before any designated individual competent to administer oaths under this title. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall then be subscribed by the deponent."

Sec. 7457, I. R. C. (1954), relating to witness fees, provides in part:

> "(a) *Amount.*—Any witness summoned or whose deposition is taken under section 7456 shall receive the same fees and mileage as witnesses in courts of the United States.
>
> * * * * * * *
>
> "(1) *Witnesses for Secretary or his delegate.*—In the case of witnesses for the Secretary or his delegate, such payments shall be made by the Secretary or his delegate out of any moneys appropriated for the collection of internal revenue taxes, and may be made in advance.
>
> "(2) *Other Witnesses.*—In the case of any other witnesses, such payments shall be made, subject to rules prescribed by the Tax Court, by the party at whose instance the witness appears or the deposition is taken."

If the United States Tax Court had possessed inherent authority to authorize the taking of depositions in matters pending before that court, statutory authority for such depositions would have been unnecessary. No similar authority has been conferred upon the District of Columbia Tax Court. The justification for the action of the District of Columbia Tax Court in these cases was Rule 29 of the rules adopted by the court which provides for the taking and use of depositions in accordance with rules relating to depositions and discovery in force in the United States District Court for the District of Columbia "insofar as such rules are applicable" (R. 63). The question of the *applicability* of the rules of the United States District Court for the District of Columbia to proceedings in the District of Columbia Tax Court is left for conjecture. Those rules, adopted under statutory authority, contain, for example, provisions for the payment under certain circumstances of fees to attorneys, and

payment of the expenses incurred by a party and his attorney in attending upon the taking of a deposition. Title 28, Section 1821, U. S. Code, provides for the payment of fees to witnesses and for mileage of such witnesses in connection with depositions. None of these provisions may be adopted or required by the District of Columbia Tax Court for the statute creating that court does not authorize the court to proceed in the manner authorized for proceedings in courts of the United States. The District of Columbia Tax Court, unlike the United States Tax Court and courts of the United States, has no authority to compel the attendance of witnesses located outside the District of Columbia.

If the District of Columbia Tax Court can, without statutory authority, authorize the taking of depositions in New York it can authorize the taking of such depositions in Guam, Hawaii, and other places beyond the continental limits of the United States, even though it cannot compel the attendance of witnesses at such depositions, and even though it cannot provide for the expenses of such witnesses. That proceedings such as this were not contemplated by the Congress when it created the District of Columbia Tax Court is demonstrated by the fact that it failed originally, and in all subsequent legislation pertaining to the Tax Court, to confer any authority upon the court to dispose of cases pending before it on the basis of depositions. The contrary appears in connection with proceedings before the United States Tax Court, an agency of the Federal Government created only a short time prior to the creation of the District of Columbia Tax Court. The importance of this matter to the administration of the tax laws of the District of Columbia and the proceedings of the District of Columbia Tax Court in reviewing assessments of taxes under those laws justifies, as in *District of Columbia* v. *Pace*, *supra*, the granting of this petition for writ of certiorari.

3.

Both the Court of Appeals and the Tax Court Erred in Their Construction of the Use Tax Act, as Well as in Deciding These Cases in the Absence of Essential Findings of Facts.

Section 212 of the District of Columbia Use Tax Act, *supra*, imposes a tax, *inter alia*, upon the use of any tangible personal property purchased at *retail sale* at the rate of 2 per centum of the *sales price* of such sale. Section 201 (a) of the Act defines *retail sale* to mean, with certain exceptions not here material, all sales of tangible personal property, whether made within or without the District, and services, to any person for the purpose of use within the District. (App. B, p. 3b)

The word *purchased* is defined in Section 202 of the Act to mean and include *any transfer, either conditionally or absolutely, of title or possession or both of the tangible personal property sold at retail* as well as *any acquisition of a license or other authority to use the tangible personal property* sold. (App. B, p. 4b)

Tangible personal property is defined in Section 119 of the District of Columbia Sales Tax Act, *supra*, to mean *corporeal personal property of any nature*, and the *sales price* referred to in Section 212 of the Use Tax Act, upon which District use taxes are based, is defined in Section 116 of the Sales Tax Act to mean *the total amount paid by a purchaser* to a vendor *as consideration for a retail sale without any deduction on account of (1) the cost of the property sold* or (2) *the cost of materials used, labor or service cost, or any other expenses.* These definitions are made applicable to the use tax by Section 210 of the Use Tax Act. (App. B, p. 2b)

The word *use* is defined in Section 206 of the Use Tax Act to mean, *inter alia, the exercise by any person within the District of any right or power over tangible personal property* sold at retail sale. (App. B, p. 4b)

Section 201 (b) (3) of the Use Tax Act excludes from the definition of "retail sale" and thereby exempts from the use tax, *inter alia, personal service transactions which involve sales as inconsequential elements for which no separate charges are made.* The requirements for this specific exemption are that (1) the retail sale must be one for personal services and (2)involve sales as inconsequential elements for which no separate charges are made. (App. B, p. 3b) The Commissioners of the District of Columbia have promulgated a regulation applicable to the second requirement for exemption as follows:

> "* * * The phrase 'sales as inconsequential elements' shall be deemed to include any sales of tangible personal property made in connection with professional, insurance, or personal service transactions where the sales price of the tangible personal property is less than 10% of the amount charged for the services rendered in the transaction."[9]

Under the well-established doctrine of strict construction of exemption provisions of statutes,[10] *both* requirements must be fully met in order to obtain the exemption and any doubt in respect thereto must be resolved in favor of the Government.

The contracts between the Syndicates and respondents do not refer to any "personal service" to be rendered by the Syndicates to respondents in connection with the supplying of the "features" called for by such contracts. Each

[9] Published in para. 64-005, District of Columbia Tax Service, Commerce Clearing House, Inc.

[10] *Atlantic Coast Line Railroad Co.* v. *Phillips*, 332 U.S. 168, 173; *Ford* v. *Delta Pine & Land Co.*, 164 U.S. 662, 666; *Chicago Theological Seminary* v. *Illinois*, 188 U.S. 662, 672.; *Phoenix Fire and Marine Ins. Co.* v. *Tennessee*, 161 U.S. 173, 177; *Yazoo & Miss. Valley R. Co.* v. *Adams*, 180 U.S. 1, 22; *Washington Chapter of the American Institute of Banking* v. *District of Columbia*, 92 U.S. App. D.C. 139, 203 F. 2d 68; *Hebrew Home for the Aged* v. *District of Columbia*, 79 U.S. App. D.C. 64, 142 F. 2d 573; *Combined Congregations of the District of Columbia* v. *Dent*, 78 U.S. App. D.C. 254, 140 F. 2d 9.

of the contracts provides that the "features" to be supplied by the Syndicates to respondents shall be supplied in matrix form. This matrix is a fibrous mat containing impressions of the particular feature which respondents use in preparing the feature for presentation in their newspapers. The contracts contain provisions which relieve the Syndicates from liability to respondents in the event the Syndicates are unable to obtain a feature from the artist or author who supplies such feature to the Syndicates which, in turn, sell the feature to respondents. The prices to be paid for the features by respondents are set forth in the contracts between the Syndicates and respondents. Generally speaking, the agreed price was payable for the feature for a period of a week, and no reference is made in the terms relating to price either to the value of the feature or the cost of it to the Syndicates (R. 75, 103, 106, 111, 117, 122, 126, 130).

The District of Columbia Tax Court, over objection, received and considered evidence adduced by respondents relating to the costs to the Syndicates of obtaining the matrix which was furnished to respondents under their contracts. These costs were manufacturing costs and most of the work of manufacturing the matrices, which included materials and services, was done by other commercial concerns for the Syndicates; that is, the Syndicates obtained the matrices from independent contractors (R. 9, 10, 16, 17, 21, 22-37, 45-50, 136-141, 148, 149).

It cannot be questioned that the comic strip matrices supplied to respondents in these cases, the price of which was the basis for the assessments of District of Columbia use taxes against respondents, were tangible personal property as defined in the District of Columbia Sales Tax Act, *supra*. Upon the receipt of the matrix, respondents, by their contracts with the Syndicates, obtained the right to use the mat in the publication of respondents' newspapers (R. 43, 44). The transfer of the corporeal property

to respondents, together with the right in respondents to use that property, coupled with the *use* by respondents of the matrice, which is defined by the tax statute to mean the exercise of any right or power over tangible personal property in the District, clearly subjected respondents to the use tax based upon the price which respondents paid to the syndicates under their contracts.

The Tax Court, in its findings of fact (R. 76-78), made findings which showed the "value or sales price of mats" to be, in every case, less than ten per cent of the weekly prices or charges which respondents paid under the contracts with the Syndicates. Nothing appears in the contracts, or in the evidence before the Tax Court, upon which the Tax Court could make a determination as to the "sales price" of the mats; the only evidence before the Court related to the *costs to the Syndicates* (which, under Sec. 116 of the statute (App. B, p. 2b), cannot be considered) of obtaining the matrices from independent contractors, without regard to any other costs to the Syndicates in conducting their operations. The District of Columbia Tax Court made no finding of fact or conclusion of law that the contracts between the Syndicates and respondents were personal service transactions which involve sales as inconsequential elements for which no separate charges were made. If exemption from District of Columbia use tax was to be conferred upon respondents on the basis that the matrices supplied to respondents by the Syndicates were personal service transactions which involved sales as inconsequential elements for which no separate charges were made, as the statute provides, it was imperative that the District of Columbia Tax Court make a finding to that effect. Its failure to do so disregarded the statutory requirement of Section 3, Title IX of the District of Columbia Revenue Act of 1937, as added and amended, *supra*, which provides that:

> "The board shall hear and determine all questions arising on said appeal and shall make separate findings of fact and conclusions of law, and shall render its decision thereon in writing * * *." (App. B, p. 5b)

It is important to the administration of the District of Columbia tax laws that in cases appearing before the District of Columbia Tax Court, these cases be decided in accordance with statutory requirements. In the cases involving respondents, the assessments of District of Columbia use taxes against respondents were cancelled without any finding of fact or conclusion of law by the District of Columbia Tax Court that the transactions between respondents and the Syndicates were within the statutory exemption clause, and this action was affirmed by the United States Court of Appeals for the District of Columbia Circuit without reference to that matter. It is impossible from the findings of fact and decision of the District of Columbia Tax Court, or from the decision of the United States Court of Appeals for the District of Columbia Circuit in these cases to reach a conclusion that either of those Courts found as a matter of fact or as a matter of law that the taxes were erroneously assessed.

The opinion of the District of Columbia Tax Court refers to *Washington Times-Herald, Inc.* v. *District of Columbia*, 94 U.S. App. D.C. 154, 213 F. 2d, 23, decided by the Court of Appeals en banc. That case involved, as do these, the question of the liability of newspapers for District of Columbia use taxes. The Court of Appeals held in that case:

> "The price was paid for the artists' work, i.e., for the right to reproduce the impressions on the mats,—not for the mats themselves. The newspaper bought the creation of the artist—not the material on which it was impressed—and the right to reproduce it. Without that right, the comic strips mats would be entirely worthless.

> "The transactions in question are clearly exempt under §47-2701, subd. 1(b)(3)." [11]

The conclusion in *Washington Times-Herald, Inc.* v. *District of Columbia, supra*, conflicts squarely with *Meyer* v. *Washington Times Co.*, 64 App. D.C. 218, 76 F. 2d 988, cert. denied 295 U.S. 734, in which the Court of Appeals held that a contract in substance identical with those between the Syndicates and respondents in these cases, was not a contract for personal service but was a contract for the sale of merchandise, to wit, the matrice containing a feature. In that case the Court of Appeals said:

> "It is insisted, however, that this is not strictly a contract but in the nature of a license to use and publish copyrighted material. Whatever may be the effect of such a license between the Tribune Company and the artists producing the comics in question may be disregarded, since the contract involved is not with the artists but with the Tribune Company for the sale of the merchandise to one of its customers."

No reference to the *Meyer* case is contained in *Washington Times-Herald, Inc.* v. *District of Columbia, supra*, and the *Meyer* case has not been overruled by the *Times-Herald* case, nor has it been overruled by the decision of the United States Court of Appeals for the District of Columbia Circuit in these cases. Both of these decisions cannot be right. As it now stands, a serious question is presented in the construction and application of the District of Columbia Sales Tax Act and the District of Columbia Use Tax Act. The District of Columbia contends that *Meyer* v. *Washington Times Co., supra*, correctly expresses the law. But, if *Washington Times-Herald, Inc.* v. *District of Columbia* is applicable in cases involving contracts between Syndi-

[11] The exemption provision of the statute relating to personal service transactions involving sales as inconsequential elements for which no separate charges are made. (App. B, p. 3b)

cates and newspapers for the supplying of material for publication of such newspapers, does that decision apply in other transactions of similar nature, or is it restricted only to newspaper operators and is the District of Columbia free to rely upon *Meyer* v. *Washington Times Co., supra*, wherever that case may be applicable?

And, as an important corrallary, in District of Columbia Tax Court cases, may those cases be decided by the Tax Court without essential findings of fact or conclusions of law in disregard of the statutory mandate that the Tax Court shall make separate findings of fact and separate conclusions of law as the basis for its ultimate determination? The construction of the District of Columbia Sales Tax Act and the District of Columbia Use Tax Act by the District of Columbia Tax Court and the United States Court of Appeals for the District of Columbia Circuit presents a question of importance justifying a review by this Court. Equal, if not greater, justification appears for a review of the Tax Court's failure to comply with statutory requirements in the disposition of cases presented to it for review.

CONCLUSION

The District of Columbia, in these cases, was entitled by statute to a hearing and review by the United States Court of Appeals for the District of Columbia Circuit of the errors which it alleged had been committed by the District of Columbia Tax Court in that court's decisions in these cases. The refusal of the United States Court of Appeals to permit counsel for the District of Columbia to argue a major contention of the District of Columbia on the appeals to that court and to consider that contention on the ground that a division of the court could not overrule a decision of the court rendered *in banc* was a plain denial of due process of law and the right of review conferred upon the District of Columbia by statute. The ac-

tion of the District of Columbia Tax Court, in permitting respondents to take depositions in New York City, N. Y., and in using those depositions in deciding these cases denied the District of Columbia the review of these cases contemplated and permitted by the statute creating the District of Columbia Tax Court, and the failure of that court to make findings of fact and conclusions of law essential to a proper disposition of these cases was violative of the requirements of the statute relating to procedures to be followed by that court. The cancellation of District of Columbia Use Taxes by the Tax Court, and the affirmation of that action by the United States Court of Appeals for the District of Columbia Circuit conflicts squarely with the District of Columbia Sales Tax Act and the District of Columbia Use Tax Act. For these reasons this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

VERNON E. WEST,
Corporation Counsel, D. C.,

CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,

GEORGE C. UPDEGRAFF,
Assistant Corporation Counsel, D. C.,

HENRY E. WIXON,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.